No. 85-1563

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED MARCH 22, 1986

CERTIORARI GRANTED JUNE 2, 1986

QUESTION PRESENTED

1. Whether an instruction at the penalty phase of a death penalty trial not to be swayed by mere sympathy, passion, prejudice, public opinion, or public feeling violates the Eighth Amendment where the defendant has been permitted an unlimited opportunity to present mitigating evidence and the instruction merely advised the trier of fact not to consider matters not relevant to the offense or the offender.

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BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death is reported in People v. Brown (1985) 40 Cal.3d 488. The opinion is included as Appendix A to the petition for writ of certiorari.

JURISDICTION

The judgment of the California Supreme Court was filed on December 5,

1985. (Appen. A to Petn. for Cert.) A timely petition for rehearing was denied on January 30, 1986. (Appen. B to Petn. for Cert.) The petition for writ of certiorari was docketed on March 22, 1986, within 60 days after the petition for rehearing was denied. The petition for writ of certiorari was granted on June 2, 1986. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendments Eight and Fourteen.

2. California Penal Code sections 190.2, 190.3. The text of California Penal Code sections 190.2 and 190.3 are set forth in the Appendix to this brief.

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STATEMENT OF THE CASE

By an amended information filed on October 15, 1981, the District Attorney of Riverside County charged respondent in count I with murder, in violation of California Penal Code section 187.[1] It was further alleged the murder was committed while respondent was engaged in the commission of the crime of rape within the meaning of Penal Code section 190.2, subdivision (a)(17)(iii). Respondent was also charged in count II with rape, in violation of Penal Code section 261, subdivisions 2 and 3. It was further alleged he inflicted great bodily injury within the meaning of Penal Code section 12022.8. Additionally,

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1. All statutory references are to the California Penal Code unless otherwise designated.

it was alleged he suffered two prior felony convictions. (CT 1-3.)[2/] Respondent pled not guilty and denied the special allegations. (CT 25, 82.)

On February 4, 1982, the jury found respondent guilty of first-degree murder and forcible rape as charged in the information. (CT 194-195.) The jury specifically found the murder was committed with express malice aforethought, premeditation and deliberation. (CT 196.) The great bodily injury allegation was found to be true. (CT 197.) The jury further found the special circumstances allegation that the murder was committed during the commission of rape. (Pen. Code, § 190.2, subd. (a)(17)(iii)) to be true. (CT 198.) On February 19,

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2. The designation "CT" refers to the Clerks Transcript. The designation "RT" refers to the Reporter's Transcript.

1982, the jury fixed the penalty on count I as death. (CT 314.) On February 22, 1982, the automatic motion to modify the jury's verdict to life imprisonment without parole (Pen. Code, § 190.4, subd. (e)) was denied. The court sentenced respondent to death on count I. As to count II, respondent was sentenced to state prison for the upper term of eight years with a five-year enhancement for the great bodily injury allegation plus a five-year enhancement for the first prior, the term on count II to run consecutively to count I but stayed pending appeal on count I. (CT 324, 335-337.)

On an automatic appeal to the California Supreme Court, the judgment of

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guilt and a finding of a special circumstance was affirmed. The penalty judgment was reversed.

STATEMENT OF FACTS

A. Guilt Phase

On October 28, 1980, at approximately 7:30 a.m., 15 year-old Susan Jordan and her minor sister (Karen) and brother (James) left their house located at 9946 Victoria Avenue in Riverside. (16 RT 4079-4082, 4090.)

Angelina Jordan, Susan's mother, called home from work at about 3 p.m. that day to check on Susan and the other children. Karen answered the telephone and told Mrs. Jordan that Susan had not come home. (16 RT 4094-4095.) Mrs. Jordan drove to the Arlington High School and looked for Susan.[3/] She could

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3. It was later determined Susan did not attend school that day. (21 RT 5211.)

not locate her so she drove home. Susan was not at home. (16 RT 4097-4100.) Mrs. Jordan became concerned and began checking around the neighborhood for Susan. (16 RT 4100-4104.)

Mrs. Jordan returned home and at about 7 p.m. the telephone rang. Mrs. Jordan answered it and a male voice said, "Hello, Mrs. Jordan. Susie isn't home from school yet, is she?" Mrs. Jordan replied, "No, she isn't." The male voice then said, "You will never see your daughter again. You can find her body on the corner of Victoria and Gibson." She asked the caller to repeat it and he did. She pleaded with him not to hang up, but he did. (16 RT 4105-4106.) Mrs. Jordan subsequently called the police. (16 RT 4107.)

At 7:31 p.m. a telephone call was received at the Riverside Police

Department. A male caller said, "On the corner of Gibson and Victoria, fifth row, you will find a white Caucasian body of a young girl in the orange grove." Thereafter, the caller hung up. (19 RT 4650-4653.)

Police officers were sent to the orange grove. A search of the orange grove commenced but did not turn up anything. (19 RT 4608, 4657-4659, 4660.) Mrs. Jordan later informed a police officer of the anonymous phone call she had received earlier that evening. Shortly thereafter the telephone rang and the officer answered it. (19 RT 4612.) A male voice said, "Is this the Jordan house or the Jordan residence?" He replied, "Yes." The male caller then said, "You can find Sue's identification in a telephone booth at the Texaco station at Arlington and Indiana." (19 RT

4613.) The caller then hung up. (19 RT 4614.)

Officer Taulli later arrived at the orange grove and a dog named Nikky sniffed Susan's clothing. Nikky began to search the grove. (19 RT 4662.) Shortly thereafter, Nikky led police to a pair of torn panties inside the grove. Nikky then went down to the next six rows where Susan's body was found. Susan's body was face down and dirt was piled up on each side of her head. Police secured the area (19 RT 4665-4669) and homicide detectives were called to the scene. (19 RT 4663-4664, 4673-4674, 4689.) Susan's body was nude except for a pair of socks, a blouse, and a bra partially pulled out from under the blouse. Six footprints of what appeared to be tennis shoes were located near the body and photographed. (19 RT 4678-4682.)

Meanwhile, a tape recorder and a telephone recording device were obtained and connected to the Jordans' telephone. (18 RT 4457-4458.) At about 8:40 p.m. the phone range and he answered it. A male voice said, "In the tenth row you'll find the body." (18 RT 4458-4459.)

Police officers were sent that night to a telephone booth located at the Texaco station at the intersection of Arlington and Indiana. (19 RT 4623.) A search of the booth revealed two Arlington High School identification cards belonging to Susan Jordan and an envelope or library pouch from some type of school book. (19 RT 4626, 4634, 4786-4787; 20 RT 4861-4863.) Stamped across the envelope were the words "Arlington High School." (20 RT 4863.)

In the early morning of October 29, 1980, police officers set up road

blocks on the streets surrounding the area of the orange grove. Police stopped passerbys and questioned them regarding the killing of Susan. (19 RT 4726-4727.) As a result of the roadblock, police obtained information from several individuals. Among them was Wylie Eng, a student at Arlington High School. (17 RT 4119-4120, 4159.) Eng indicated he normally saw Susan walking to school and that he usually passed her on his bicycle. On the morning of October 28, 1980, he left home for school at about 7:30 a.m. While en route to school, he saw Susan walking toward Van Buren Boulevard and then onto the bike trail toward Gibson Street near the orange grove. She was carrying her books. (17 RT 4123-4131.) As Eng approached Gibson Street, he saw a black man wearing green shorts and a green and white baseball

shirt approaching the bike trail from Gibson Street. (17 RT 4132-4133.) Near the intersection of Gibson and Victoria Streets Eng saw a copper colored Trans-Am, new model, parked on Gibson Street. (17 RT 4136-4137.)

Eng subsequently was shown a photo lineup and he picked out respondent's photo as the man he saw on the morning of October 28, 1980, near the orange grove. (17 RT 4177; 21 RT 5225.)

Julie Pim, another Arlington High School student, was also interviewed by police. On the morning of October 28, 1980, at about 7:30 a.m. she and her brother left for school. As they drove by the intersection of Victoria Street and Van Buren Boulevard, she saw Susan cross the intersection and continue walking toward Gibson Street. Susan was carrying her books up against her chest.

(17 RT 4179-4186.) She saw a black man standing on the curb near the intersection of Victoria Street and Van Buren Boulevard. He wore green shorts and a white and green top. (17 RT 4187.) Pim picked out respondent's photo from a police photo lineup. (17 RT 4227, 4239, 4241; 21 RT 5223-5224.) She identified respondent at the preliminary hearing and at trial as the man she saw that morning near the orange grove. (17 RT 4188, 4232, 4242.)

Lonnie Boozell drove his daughter to school on the morning of October 28, 1980. He saw Susan walking near Van Buren Boulevard and Gibson Street. She was carrying her books. Approximately 70 feet from Susan he saw a black man behind a tall tree between Van Buren Boulevard and Gibson Street. The man had

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jogging clothes on and appeared to be jogging in place. (17 RT 4245-4253.)

Henry Garcia and Joseph Yancey carpooled to work on the morning of October 28, 1980. While driving on Victoria Street near Van Buren Boulevard, they saw Susan walking. Approximately 15 feet behind her they saw a black man wearing jogging clothes (i.e., shorts). (17 RT 4278-4291, 4319-4327.) At trial Garcia identified respondent as being similar to the man he saw walking behind Susan that morning. (17 RT 4292.)

Marsha Johnson informed police she had driven by the area on the morning of October 28, 1980. She saw a newer model dark brown Trans-Am parked on Gibson Street. The license plate was a dealer paper plate which had "Made in America" written on it. (18 RT 4337-4345.)

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Raymond Rogers was also in the area of Gibson and Victoria Streets at about 7:40 a.m. on October 28, 1980. He saw a "Pontiac or Camaro" parked on "Gibson with a license plate that read "Made in USA" or "Made in America." (18 RT 4364-4371, 4384-4389.)

Michael Cornell, another Arlington High School student, also saw a Trans-Am parked on Gibson Street on the morning of October 28, 1980. The license plates read "Made in America." (18 RT 4397-4414.) At trial he identified respondent's vehicle as being similar to the car he saw that morning. (18 RT 4414.)

Peter Rodriguez saw a brown Trans-Am parked on Gibson Street on the morning of October 28, 1980. It had an unusual license plate which read "USA" or "America" on it. (18 RT 4468-4472.) He

saw a black man come out of the area of the orange grove and walk around to the driver's side of the Trans-Am. The man thereafter opened the trunk area of the vehicle. The individual kept staring at Rodriguez. (18 RT 4476-4477.) At trial Rodriguez identified respondent's vehicle as being similar to the Trans-Am he saw that day and testified respondent looked similar to the man he saw but he was not certain. (18 RT 4475, 4480 4481.)

Margery Johnston, a county employee, rode her bicycle to work on the morning of October 28, 1980. As she rode on the bike path adjacent to the orange grove on Gibson and Victoria Streets, she saw a black man wearing jogging clothes come out of the orange grove. He appeared startled and his legs were dirty and dusty. (23 RT 5600-5608.) She also

saw a brown sports car parked near the area. (23 RT 5610-5611.) At trial Mrs. Johnston positively identified respondent as the man she saw that day. (23 RT 5609-5612.)

On the basis of the information obtained by police from the various witnesses police initiated a surveillance of respondent and his residence on Gertrude Street. (20 RT 4843.) On November 6, 1980, police saw respondent drive up to his residence in a brown Trans-Am. (19 RT 4805-4806.) Subsequently, respondent drove from his residence and was eventually stopped and arrested by police. (19 RT 4807.)

A search warrant for respondent's residence on Gertrude Street was obtained. (20 RT 4847, 4875.) A search of the garage area revealed a paper license plate behind a water heater. The license

plate read "Made in America."[4/] (20 RT 4848, 4877; 22 RT 5446.) A search of the interior of the residence revealed a Pacific Telephone directory with a page folded back where the listing for the Jordan residence was located. (20 RT 4886-4887.) Police found and seized a book entitled "ALM Spanish Book" with Susan Jordan's signature inside the cover. (20 RT 4889-4890; 23 RT 5640.) Police also located underneath a bed two newspaper articles relating to Susan's death. (20 RT 4881-4885.)

Shortly after completing the search of respondent's house, police went to respondent's place of employment, armed with a search warrant for his locker. (20 RT 4850.) Police searched his locker

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4. Respondent had the plate on his Trans-Am in October of 1980. (18 RT 4505, 4518; 22 RT 5445-5446.)

and seized a pair of running shorts, a pair of green jogging shorts, a white and green jersey, boxer shorts, a pair of socks, a brown shirt, and some rags. (20 RT 4852-4856.)

Subsequent to the search of respondent's residence, police learned that Susan had checked out a book entitled "The Citadel." (21 RT 5228, 5242.) Police obtained another search warrant for appellant's residence. Police seized "The Citadel" from appellant's residence. (20 RT 4891-4892.)

(20 RT 4998-5001; 21 RT 5242.)

An autopsy of Susan's body revealed bruises on the nose, back area, right arm, neck, and head. The nature of the bruises suggested she was alive at the time she suffered these injuries. (22 RT 5365-5391.)

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At trial William Anderson and Norm Gibson, who were acquainted with respondent, identified the voice of the caller to the Jordan residence on October 28, 1980, and tape recorded by Chaplain Morgan, as being that of respondent. (22 RT 5449, 5453.)

B. Defense

Respondent's defense at the guilt phase was one of alibi. (23 RT 5775-5780.)

C. Penalty Phase

On October 14, 1977, at about 8 a.m., 14 year-old Kelly Porterfield was alone at her home in Riverside. She was preparing to leave for school and, as she walked down the hallway from her bedroom, someone threw a coat over her head. (25 RT 6187-6195.) Her assailant took her into the bedroom and began choking her. He threatened to kill her if she did not

comply with his wishes. (25 RT 6198-6200.) She tried to get away but to no avail. He choked her to the point of unconsciousness. She regained consciousness and he took off her clothes. (25 RT 6205-6206.) He threw her on the bed and raped her. Thereafter, the assailant left the premises. (25 RT 6207-6212.)

Respondent was subsequently arrested and charged with the rape of Kelly. He pled guilty to the rape and was sentenced to state prison. (25 RT 6213-6216.) He was released from prison on June 14, 1980, and placed on parole for a period of one year. (25 RT 6219-6220.)

D. Defense

Several of respondent's relatives testified regarding his background and personality. They found it hard to

believe respondent would commit such a heinous crime. (25 RT 6238-6300; 26 RT 6353-6374.)

Dr. Summerour, a psychiatrist, testified respondent was legally sane and did not suffer from organic brain damage. (26 RT 6387-6396.) He opined that respondent was ashamed and afraid to face his problem (i.e., sexual dysfunction). Further, that in his opinion after respondent raped Susan Jordan he formulated the intent to kill her and did so because he could not face her. That is, killing her with her face down and covering her face was his response to his emotions of shame and fear. (26 RT 6415-6418, 6461.)

SUMMARY OF ARGUMENT

At the penalty phase of the trial the jury was instructed with a

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modified version of CALJIC No. 8.84.[5/] This instruction advised the jury it must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Giving this instruction at the penalty phase of a capital case was consistent with federal constitutional law.

In Gregg v. Georgia (1972) 428 U.S. 153, 189, this Court noted Furman v. Georgia (1972) 408 U.S. 238, mandated that where discretion is given a sentencing body on a matter so grave as the determination of whether a human life should be taken, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

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5. "CALJIC" is an acronym for standard jury instructions used in criminal cases in California. The instructions are drafted by a committee of California judges.

This Court has also noted a death penalty law must permit the trier of fact to consider mitigating evidence presented by the defendant surrounding the offense and the offender. (Lockett v. Ohio (1978) 438 U.S. 586, 604; Eddings v. Oklahoma (1982) 455 U.S. 104, 113-115.)

An instruction as given here telling the jury not to be swayed by mere sympathy is consistent with the requirement discretion be suitably limited and the defendant be permitted to present all relevant mitigating evidence concerning the offense and the offender.

The instruction simply tells the jury not to decide the case based upon unfettered or untethered emotion unrelated to the facts and circumstances of the offense or the offender. Rather, the jury is to determine the punishment

based upon an analysis of the facts and circumstances of the case as related to the offense and the offender.

The instruction consequently avoids the very problem addressed in Gregg and Furman -- unfettered and arbitrary decision making by the trier of fact unrelated to the facts of the case or the character and record of the defendant. In addition, the instruction precludes the jury from determining the penalty without standards and in the arbitrary and capricious manner this Court condemned in Roberts v. Louisiana (1976) 428 U.S. 325. Moreover, the instruction does not preclude the jury from considering relevant mitigating evidence bearing on the offense or the offender as mandated by Lockett v. Ohio, supra, 438 U.S. at p. 604.

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The instruction also is a benefit to a defendant facing the death penalty as it tells the jury not to be swayed by sympathy for anyone and thus precludes the jury from being swayed by sympathy for the victim or the victim's family to the detriment of the defendant.

Moreover, under the California death penalty law, the jury was instructed with CALJIC No. 8.84.1 which directed the jury to consider various factors relating to the offense or the offender. Subsection (k) of the instruction indicates the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. CALJIC No. 8.84.1 thus assures the jury will consider all relevant evidence relating to the offense and the offender as mandated by this Court. Indeed, CALJIC No. 8.84.1

is a virtual restatement of California Penal Code section 190.3 which this Court has concluded allows the jury to consider all matters relevant to the offense and the offender. (California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19.)

The sympathy instruction also advises the jury to render a just verdict regardless of the consequences. This provision of the instruction also is consistent with federal constitutional principles. It tells the jury not to consider unrelated facts, emotions, or consequences, but simply to weigh the facts relating to the offense and the offender. This is consistent with Lockett and Eddings and comports with the mandate of Furman.

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Consequently, it is clear instructing the jury with a modified version of CALJIC No. 8.84 did not violate the federal Constitution.

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ARGUMENT

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IT DOES NOT VIOLATE THE FEDERAL CONSTITUTION FOR THE TRIAL COURT TO INSTRUCT THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE THAT THE JURY IS NOT TO BE SWAYED BY MERE SENTIMENT, CONJECTURE, SYMPATHY, PASSION, PREJUDICE, PUBLIC OPINION OR PUBLIC FEELING

The issue presented in this case is whether it constitutes federal constitutional error to instruct the jury at the penalty phase of a death penalty trial not to be swayed by mere sympathy, passion, prejudice, public opinion, or public feeling where the defendant has been permitted an unlimited opportunity to present mitigating evidence and the instruction merely advised the trier of fact to not consider matters not relevant to the offense or the offender.

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A. History and Background of the Instruction

It is standard practice in California to instruct the jury in a criminal trial with CALJIC No. 1.00 which advises the jury of its duties. Indeed, the instruction was given with other guilt phase instructions in this case. (CT 212-213.)

The last paragraph of this instruction advises the jury that:

> "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences will be." (CT 212-213; RT 6559; JA 20.)

At the penalty phase the court instructed the jury with a modified version of CALJIC No. 8.84. This instruction

generally advises the jury of its duties at the penalty phase. As modified in this case, it also contained a paragraph similar to that contained in CALJIC No. 1.00 concerning sympathy. The instruction reads as follows:

> "The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been specially found to be true.
>
> "It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found to be true.
>
> "Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.
>
> "<u>You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice</u>,

> public opinion or public feeling. · Both the People and the defendant has (sic) right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be." (CT 319; emphasis added; RT 6558-6559; JA 20.)

In 1965 and again in 1966 the California Supreme Court concluded a similarly worded instruction was not to be given at the penalty phase of a death penalty case. (People v. Anderson (1966) 64 Cal.2d 633, 641; People v. Polk (1965) 63 Cal.2d 443, 451.) The court held that it was error to instruct the jury at a penalty phase not to consider sympathy for the defendant in reaching its verdict since this was a valid factor for consideration in fixing punishment. (People v. Friend (1957) 47 Cal.2d 749, 767-768)

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The court reached the same conclusion in People v. Bandhauer (1970) 1 Cal.3d 609, 618.

Bandhauer and the other cases were decided under the death penalty law in existence prior to 1972. However, this law was invalidated by the California Supreme Court in 1972 in People v. Anderson (1972) 6 Cal.3d 628, 656. There the California Supreme Court held the death penalty was cruel or unusual within the meaning of the California Constitution.

In November of 1972, the People of California adopted a constitutional amendment (Cal. Const., Art. I, § 27) to restore the death penalty. (See Gregg v. Georgia, supra, 428 U.S. 153, 181.) Pursuant to that constitutional authorization, and after this Court's decision

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in Furman v. Georgia, supra, (1972), 408 U.S. 238, the California Legislture adopted statutes providing a mandatory death penalty for certain aggravated forms of murder and other offenses. (Cal. Stats. 1973, Ch. 719.)

After this Court's elucidation of Furman in Gregg v. Georgia, supra, and the other cases decided the same day, California's mandatory statutes were found to be invalid by the California Supreme Court. (Rockwell v. Superior Court (1976) 18 Cal.3d 420, 445.)

By emergency legislation effective August 11, 1977, (Cal. Stats. 1977, Ch. 316), the California Legislature adopted new capital sentencing procedures. That legislation was upheld by the California Supreme Court. (People v. Frierson (1979) 25 Cal.3d 142, 172-184;

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People v. Jackson (1980) 28 Cal.3d 264, 315-317; People v. Harris (1981) 28 Cal.3d 935, 964.)

Meanwhile, on November 7, 1978, the voters of California adopted Proposition 7, an initiative statute. That is the law now in effect in California. (See generally Pen. Code, §§ 190.1-190.4.) Respondent here was tried under this 1978 death penalty law.

Under the 1978 death penalty statute, once the defendant stands convicted of a first degree murder and the jury has found one or more charged special circumstances to be true, the case proceeds to a penalty trial at which the jury must decide only between two possible punishments, death or life imprisonment without the possibility of parole. (Pen. Code, §§ 190.2, 190.3.) The jury in making this decision is to

consider, take into account, and be guided by evidence of enumerated aggravating and mitigating circumstances introduced at the penalty phase or gleaned from the earlier guilt trial. The law also provides that if the jury finds the aggravating circumstances outweigh the mitigating circumstances, it shall impose a sentence of death. (Pen. Code, § 190.3; People v. Brown, supra, at p. 538.[6/]

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6. The California Supreme Court concluded in this case the provision that the jury shall impose the death penalty if it found the aggravating circumstances outweighed the mitigating circumstances comported with the federal Constitution only if the provision was interpreted to give the jury the discretion to not impose the death penalty if it did not feel punishment was appropriate. (People v. Brown, supra, at pp. 544-545, fn. 17.) Respondent also petitioned this Court to grant certiorari on this issue in this case on the ground the decision was in conflict with prior decisions of this Court. (See Jurek v. Texas (1976) 428 U.S. 262; Profitt v. Florida (1976) 428 U.S. 242; Zant v. Stephens (1983) 462 U.S. 862, 874.) However, this court has declined to grant certiorari on this issue.

During the penalty phase of a case tried under the 1978 law, the jury is given two other essential instructions. They are CALJIC No. 8.84.1 and CALJIC No. 8.84.2. These instructions read as follows:

CALJIC No. 8.84.1

> "In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the recent proceeding and the existence of any special circumstance[s] found to be true.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of

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force or violence or the expressed or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [sic] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (RT 6559-6560; JA 20-23.)

CALJIC 8.84.2

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

"After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a

sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

"You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

"Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom." (RT 6560-6562; JA 23-24.)

The California Supreme Court dealt with the validity of giving the sympathy instruction at the penalty phase under the 1977 death penalty law in People v. Easley (1983) 34 Cal.3d 858, 875. In Easley the trial court gave the jury CALJIC No. 1.00 at the penalty phase. On appeal the State argued that Bandhauer and the cases upon which it

relied were no longer valid because the jury did not have unlimited discretion to exercise discretion as it did in California before decisions by this Court in Furman v. Georgia, supra, 408 U.S. 238, and Gregg v. Georgia, supra, 428 U.S. 153. Furman and Gregg indicated the discretion of the jury at the penalty phase must be somewhat circumscribed. The California Supreme Court, however, rejected this contention noting the instruction violated Eddings v. Oklahoma, supra, 455 U.S. 104, and Lockett v. Ohio, supra, 438 U.S. 586, as these cases make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any sympathy factor raised by the evidence before it. (Id., at p. 876.)

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The California Supreme Court reached the same conclusion in People v. Lanphear (1984) 36 Cal.3d 163, 165. In the instant case which was tried under the 1978 law, the court again found it was error to instruct the jury with CALJIC Nos. 1.00/8.84 at the penalty phase. (See too People v. Leach (1985) 41 Cal.3d 92, 111; People v. Montiel (1985) 39 Cal.3d 910, 928.) The court also rejected the argument presented by the state here as had been presented in Lanphear, supra, that the giving of CALJIC No. 8.84.1 eliminated any prejudice to a defendant. CALJIC No. 8.84.1, subdivision (k), provides the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. Petitioner argued the jury could consider

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any factor in mitigation and thus would consider sympathy if appropriate.

The California Supreme Court concluded CALJIC No. 8.84.1(k) was also ambiguous and this instruction when combined with the anti-sympathy warning would divert the jury from its constitutional duty to consider any sympathetic aspect of the defendant's character or record whether or not related to the offense for which he is on trial in deciding the penalty. (People v. Brown, supra, 40 Cal.3d at p. 537.)

B. Argument

At the penalty phase of the trial the jury was instructed with a modified version of CALJIC No. 8.84 which advised the jury that it "must not be swayed by mere sentiment, conjecture,

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sympathy, passion, prejudice, public opinion or public feeling." The prosecutor made similar arguments, both during the voir dire of jurors and at the close of the penalty case. (People v. Brown, supra, 40 Cal.3d p. 537.)

Giving the instruction at the penalty phase was consistent with federal constitutional law.

In Furman v. Georgia, supra, 408 U.S. 238, this Court held the death penalty could not be imposed under sentencing procedures that created a substantial risk the death penalty would be imposed in an arbitrary and capricious manner. Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be

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suitably directed and limited in order to minimize the risk of wholly arbitrary and capricious action. (Gregg v. Georgia, supra, 428 U.S. 153, 188-189.)

In Gregg v. Georgia, supra, at p. 195, this Court observed that,

> "In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, at p. 195.)

In response to the concerns of Furman expressed by this Court, some states took all discretion away from the jury and enacted statutes which required the

jury impose the death penalty if it concluded the defendant had committed a certain crime. (Woodson v. North Carolina (1976) 428 U.S. 280.) This Court concluded such laws do not fulfill Furman's basic requirement of replacing arbitrary and wanton jury discretion with objective standards to guide, regulate, and make rationally reviewable the process of imposing a death sentence. (Id., at p. 303.) Moreover, such laws do not permit particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition of the death sentence. (Id. at p. 303.)

Since Woodson, this Court has repeatedly noted the touchstone of a valid death penalty law is that it permit the trier of fact that is to determine death be able to consider the facts

surrounding the offense and the offender. (Lockett v. Ohio, supra, 438 U.S. at p. 604; Eddings v. Oklahoma, supra, 455 U.S. at pp. 113-115.)

Indeed, in Lockett and Eddings this Court observed that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death. (Lockett v. Ohio, supra, at p. 604.)

Thus, in essence, this Court has concluded in Furman a trier of fact is not to be given unlimited or arbitrary discretion in determining whether to impose the death penalty. In addition, after Lockett and Eddings the trier of

fact may be permitted to consider the penalty only after consideration of any aspects of the defendant's character or record or any circumstance of the offense the defendant proffers as a basis for a sentence less than death.

The California Supreme Court in this case concluded that admonishing the jury not to be swayed by mere sympathy in argument, voir dire, or by instructions, violates Lockett and Eddings as it precludes the jury from considering mitigating evidence relating to the offender. However, this holding misreads Furman, Lockett, and other decisions of this Court.

The sympathy instruction given here simply tells the jury not to be swayed by mere sentiment, sympathy, conjecture, passion, prejudice, public opinion or public feeling. This means the

trier of fact is not to decide the case based upon unfettered or untethered emotions unrelated to the facts and circumstances of the offense or the offender. Rather, the trier of fact is to determine the punishment based upon an analysis of the facts and circumstances of the case as related to the offense and the offender.

Such an instruction is consistent with Furman v. Georgia, supra, as it tells the jury not to arbitrarily decide the punishment based on factors unrelated to the facts and circumstances of the case or the offender, and based solely on emotion. Indeed, the instruction advises the jury to avoid the very problem addressed in Furman: unfettered and arbitrary decision making by the trier of fact unrelated to the facts of the case or the character and record of the defendant.

Such an instruction also is consistent with the decision of this Court in Roberts v. Louisiana (1976) 428 U.S. 325. In Roberts, a post-Furman case, a plurality of this Court struck down a Louisiana death penalty law that required the death penalty be imposed if the trier of fact convicted the defendant of first degree murder, but permitted the jury, without any standards or evidence of lesser included offenses, to find the existence of the lesser included offenses of second degree murder or voluntary manslaughter as a means of showing mercy. This Court concluded this procedure resulted in standardless and arbitrary and capricious decision making by the trier of fact contrary to the dictates of Furman.

Roberts makes it clear while a trier of fact is to consider as

mitigating evidence any aspect of the defendant's character or circumstances relating to the offense, the trier of fact does not have unlimited discretion to render a verdict based on sympathy or emotion unrelated to the facts of the case.

Indeed, Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12, makes it self-evident the trier of fact is only to consider evidence bearing on the offense and the offender that is relevant to the facts of the case and the offender. "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or circumstances of the offense."

The giving of a modified version of CALJIC No. 8.84 did not violate the federal constitution. It precluded the jury from being swayed by

mere emotion unrelated to the fact of the case or the offender which could result in arbitrary and capricious decision making. Instead, it limited the jury to a consideration of the facts and circumstances of the case relevant to the offense and the offender as mandated by Roberts and Lockett.

For example, the instruction precludes the jury from being unduly swayed for or against a defendant in the penalty determination because of matters which deserve no consideration such as race, good looks, or social status. One jury may be overly sympathetic to a defendant because he appears to have boyish good looks or is from a well respected family. By contrast, a jury may be unduly harsh on a defendant because of his race, physical appearance, or because he is a blue collar worker.

Advising the jury not to be swayed by sympathy, passion, or prejudice focuses the jury on the evidence bearing on the offense and relating to the character of the offender, and not matters which deserve no consideration in the punishment determination.

Moreover, the jury was instructed in this case with CALJIC No. 8.84.1 which allowed the jury to consider various factors relating the offense and the offender. Subsection (k) of this provision indicates the jury may consider any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC No. 8.84.1 thus allowed the jury to consider all relevant evidence relating to the offense and offender as mandated by this Court in

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Lockett and Eddings, while CALJIC No. 8.84 cautioned the jury to not be swayed by mere emotion and thereby precluded the jury from making an arbitrary and capricious decision as condemned by this Court in Furman and Roberts. Thus, CALJIC No. 8.84 was properly given here and is consistent with the holdings of this Court. Moreover, admonitions to the jury not to be swayed by mere sympathy or emotion were also proper.

However, the California Supreme Court has suggested CALJIC No. 8.84.1, subdivision (k) might not comport with federal constitutional standards as it does not permit the trier of fact to consider mitigating evidence relating to the offender but only that relating to the offense.

But, the language of subsection (k) clearly indicates it deals with any circumstance mitigating the offense

including those involving the offender. In addition, CALJIC No. 8.84.1 as given is essentially a restatement of Penal Code section 190.3 and this Court has concluded 190.3 is consistent with Lockett. Thus, CALJIC No. 8.84.1 as given measures up to the standards in Lockett and deals with the offense and offender as well.

As this Court noted in California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19:

> "We note further that respondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of

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> Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops.3d 26 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. Cal. Penal Code Ann. § 190.3 (West Supp. 1983)."

Thus, any argument regarding defects in CALJIC No. 8.84.1 is meritless here. In addition, nothing in the instruction precludes the jury from considering any mitigating factor that might not be mentioned by the statute or the instruction.

In addition, this Court upheld a similar version of section 190.3 under the 1977 law and the entire 1977 California death penalty law in Pulley v. Harris (1984) 465 U.S. 37, 53, noting that:

> "By requiring the jury to find at least one special circumstance beyond a reasonable

doubt, the statute limits the death sentence to a small sub-class of capital-eligible cases The statutory list of relevant factors, applied to defendants within this sub-class, 'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty.' Harris v. Pulley, 692 F.2d, at 1194, 'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate,' id., at 1195. The jury's 'discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg, 428 US, at 189, 49 L Ed 2d 859, 96 S Ct 2909. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review cannot be successfully challenged under Furman and our subsequent cases." (Pulley v. Harris, supra, 465 U.S. at p. 53; emphasis added.)

Accordingly, under the instructional scheme of this case, CALJIC No. 8.84.1 allowed the jury to consider all relevant mitigating evidence relating

to the offense and the offender. The sympathy instruction on the other hand precluded the jury from rendering a verdict of death based on untethered emotions or sentiment. Thus, it and similar admonitions were properly given in this case as a means of precluding the jury from rendering an arbitrary and capricious finding.

Consequently, the California Supreme Court's conclusion that the trial court improperly instructed the jury with the modified version of CALJIC No. 8.84 is erroneous. The instruction instead was consistent with the dictates of the Eighth and Fourteenth Amendments and the decisions of this Court. Indeed, it was used to preclude the very problems raised by this Court in Furman. "It is of vital importance to the defendant and to the community that any decision to impose the

death sentence be, and appear to be, based on reason rather than caprice and emotion." (Gardner v. Florida (1977) 430 U.S. 349, 358.)

As Justice Mosk, of the California Supreme Court, noted in his dissenting opinion in People v. Lanphear, supra, 36 Cal.3d at p. 170.

> "Where my colleagues go wrong is in their conclusion that elimination of sympathy as a factor somehow prevents the jury from weighing mitigating circumstances. Nothing could be further from reality. The jurors were instructed by the court to 'consider all the evidence which has been received during the trial,' and they were further advised specifically to weigh the aggravating and mitigating circumstances 'that you find to be established by the evidence.'
>
> "The defendant presented all the evidence he could muster regarding his unfortunate background and certain purported redeeming qualities of character. Those were his mitigating circumstances.

> Sympathy, on the other hand, is not a characteristic of the defendant; it is an emotion of the jurors. Thus, when jurors were cautioned not to be swayed by sympathy, they were not being instructed to ignore thoughtful and dispassionate consideration of the defendant's proffered mitigation. They were merely admonished to employ reason, not emotion. That is sound advice in a court of law. Justice Cardozo reminded us: 'The balance is swayed, not by gusts of fancy, but by reason.' (Cardozo, Growth of the Law (1924) p. 58.)
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> "What my learned colleagues fail to comprehend is that if jurors are permitted -- indeed, encouraged -- to entertain emotion in assessing penalty, in most instances they are likely to order death for the miscreant." (People v. Lanphear, supra, 36 Cal.3d at p. 170, emphasis added.)

Support for our position may be found in cases from other jurisdictions that have concluded the giving of a similar

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type of instruction was proper.) (People v. Stewart (Ill. 1984) 473 N.E.2d 1227; People v. Perez (Ill. 1985) 483 N.E.2d 250, 260-261; Brewer v. State (Okla. Cr. 1982) 650 P.2d 54, 60-61; State v. Chafee (S.C. 1984) 328 S.E.2d 464, 470; see too State v. Watson (La. 1984) 449 So.2d 1321, 1331-1332.)

In addition, it must be noted the instruction does not advise the jury to be prejudiced against the defendant, but speaks in general terms about not being swayed by sympathy. Thus, the instruction also advises the jury not to be swayed by sympathy for the victim or the family of the victim and thus aids the defendant in receiving a fair trial. As Justice Mosk noted in his dissenting opinion in People v. Lanphear, supra, at 36 Cal.3d 163, 170:

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"I continue to adhere to the views expressed in my dissent in People v. Bandhauer (1970), 1 Cal.3d 609, 619 (citations) and in my dissent in People v. Easley, supra, 34 Cal.3d at page 886: 'In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant.'"

The courts in Oklahoma (see Brewer v. State, supra), and South Carolina (see State v. Chafee, supra), have reached similar conclusions.

In People v. Brown, supra, 40 Cal.3d at p. 538, fn. 7, the California Supreme Court also concluded the portion of CALJIC No. 8.84 which advised the jury to render a just verdict regardless of the consequences would be understood by

the jury in the same light as an instruction to disregard sympathy and thus indicated this part of CALJIC No. 8.84 should not be given.

However, as noted with regard to the other provision of this instruction, it does not violate the federal Constitution to advise the jury to render a just verdict regardless of the consequences. The instructions tells the jury not to consider unrelated facts, emotions, or consequences, but to simply weigh the facts relating to the offense and the offender. This is consistent with Lockett and Eddings and comports with the mandate of Furman that the jury not have untrammeled discretion.

Thus, it is clear instructing the jury with CALJIC No. 8.84 did not violate the United States Constitution.

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CONCLUSION

For all the foregoing reasons Petitioner State of California respectfully requests the judgment of the California Supreme Court be reversed insofar as it reverses the penalty of death and that the cause be remanded to that Court for further proceedings.

Respectfully submitted,

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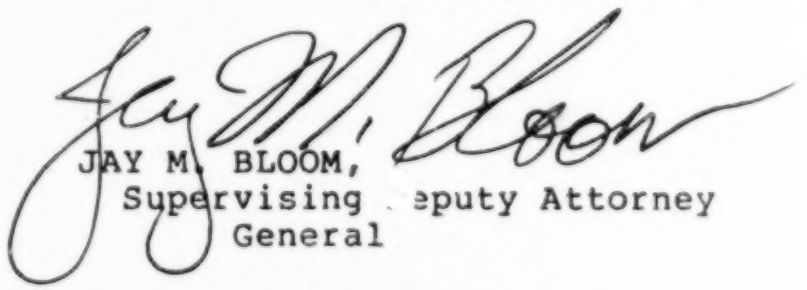

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APPENDIX

CALIFORNIA STATUTE

PENAL CODE

§ 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall

be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver,

or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the

local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscience-

less, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral Copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

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§ 190.4

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special

circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the

finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special

circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of

fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026,

the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the

defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of a death penalty verdict

pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Penal Code section 190.3

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony

conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

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However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in

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rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which

involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of

counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.
(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)

AFFIDAVIT OF SERVICE BY MAIL

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No: 85-1563
October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF THE MERITS as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Robert Scarlett
Monica Knox
Deputy State Public Defenders
107 South Broadway, Suite 9111
Los Angeles, CA 90012

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 14 day of July 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 14, 1986.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 14th day of July 1986.

Brenda J. Locke
Notary Public in and for said County and State

OFFICIAL SEAL
BRENDA J. LOCKE
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Exp. Feb. 20, 1988